WHITE ADM'R *v.* PALMER *et al.*

Nov. 18, 1909.

[66 S. E. 44.]

1. Judgment (§ 870*)—Revival—Scire Facias—Nature of Proceeding.—Scire facias to revive a decree is properly brought at law.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 870.*]

2. Judgment (§ 870*)—Revival—Scire Facias.—An irregular or erroneous scire facias is voidable only, and, if the irregularity is not taken advantage of in some appropriate proceeding, the judgment of revivor is valid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1638; Dec. Dig. § 870.*]

3. Judgment (§ 870*)—Revival—"Scire Facias"—Nature of Proceeding.—Scire facias to revive a judgment is not a new suit, but a continuation of the old one to obtain execution which can no longer be issued as of right because of lapse of time, the writ serving the double purpose of a writ and declaration, and following the judgment to be revived as to amount, date, and parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1613; Dec. Dig. § 870.*

For other definitions, see Words and Phrases, vol. 7, pp. 6351-6355; vol. 8, p. 7796.]

4. Judgment (§ 870*)—Revival—Scire Facias—Jurisdiction—Extent.—The extent of a court's jurisdiction on a writ of scire facias to revive a judgment for money only is to render judgment that the plaintiffs in the writ have execution on the judgment alleged therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1631-1633; Dec. Dig. § 870.*]

5. Judgment (§ 870*)—Revival—Scire Facias—Lien.—A judgment on scire facias to revive a judgment for money only directing that plaintiff have execution on the original judgment does not constitute a lien on realty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1634; Dec. Dig. § 870.*]

6. Judgment (§ 870*)—Revival—Scire Facias—Judgment on Writ.—Where a judgment on a writ of scire facias to revive a judgment erroneously granted a new judgment for a sum of money only, and also awarded execution, so much of the judgment as awarded the new judgment for money was a nullity for want of jurisdiction and subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1631, 1632, 1634; Dec. Dig. § 870.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

7. Judgment (§ 870*)—Scire Facias—Requisites.—A writ of scire facias to revive a judgment is the only pleading in the proceeding, and must recite a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1616, 1617; Dec. Dig. § 870.*]

8. Judgment (§ 870*)—Revival—Scire Facias.—Interstate recovered judgment against defendants in July, 1882, which was attempted to be revived by several scire facias proceedings issued respectively on February 16, 1891, September, 1896, and September, 1898. Held, that the proceedings of September, 1896, and 1898 being void for want of jurisdiction in that no reference was made therein to the original judgment sought to be revived, the judgment was barred by limitations prior to the commencement of other proceedings in May, 1906, which could not therefore be maintained.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 870.*]

Error to Corporation Court of City of Bristol.

Action by Milton White, as administrator of N. K. White, against George W. Palmer and others. From a decree dismissing the bill, plaintiff brings error. Affirmed.

Honaker & Campbell and *Jos. L. Kelly,* for plaintiff in error.
Page & Fulkerson, White & Penn, John W. Neal, and *J. Irby Hurt,* for defendants in error.

KEITH, P. On the 27th day of July, 1882, the Supreme Court of Appeals of Virginia rendered a decree in favor of Newton K. White against Stuart, Buchanan & Co., which firm was composed of W. A. Stuart, Ben. K. Buchanan, George W. Palmer, and Joseph Jacques, for the sum of $9,393.62, with interest on a part thereof from the 1st day of January, 1878, until paid; and at the first May rules, 1906, Milton White, Jr., as the administrator of Newton K. White, filed his bill in order to have satisfaction of this decree out of the property of those named as defendants therein and of certain other persons who had from time to time purchased real estate upon which it is claimed the aforesaid decree constituted a lien.

The defendants appeared and pleaded the statute of limitations of five years, of ten years, and of twenty years as a bar to the plaintiff's demand, and the corporation court of Bristol, to which the cause had been transferred, entered a decree sustaining the plea of the statute of limitations, without stating which statute it referred to, and dismissed the bill.

The decree sought to be enforced was, as we have seen, rendered on the 27th of July, 1882, and was docketed on the 27th

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

day of October of that year. From an exhibit filed with the bill it appears that in February, 1891, a scire facias was sued out upon this decree, which was duly served upon the parties, and at a circuit court held for Washington county on the 4th of May, 1891, the following order was entered:

"White *v.* Stuart and Others.

"On a Scire Facias to Revive a Judgment.

"The defendants being duly warned and not appearing, it is considered by the court that the plaintiff may have execution against the said defendants for the sum of $9,393.62, with interest on $5,297.60, part thereof from the 1st day of January, 1878, till paid and his costs in this behalf expended."

It is objected to this execution that it issued from the law side of the circuit court upon a decree in chancery.

We do not think this objection well taken. The statute gives the same effect to a decree as to a judgment, and, while the decree is the result of a suit in chancery, the scire facias to revive a judgment or decree is a strictly legal process, and, if regular in other respects, is not invalidated by reason of its having been brought on the law side of the court in order to have an award of execution upon a decree in chancery.

There seems to have been no execution issued upon this order awarding an execution.

In September, 1896, another scire facias was sued out, which recites the proceeding upon the scire facias at the May term, 1891, of the circuit court of Washington county, and sets forth that since the date of the order awarding execution on the judgment Newton K. White, the plaintiff, William A. Stuart, and Joseph Jacques have departed this life, and Hartley G. White has duly qualified as executrix of Newton K. White, deceased, and at her instance a scire facias was sued out against the surviving defendants in the judgment. Process to answer this proceeding was duly served upon Palmer and Buchanan, and at a circuit court held on the 28th day of September, 1896, the following order was entered:

"Hartley G. White, Executrix of Newton K. White, Deceased, *v.* George W. Palmer and Benjamin K. Buchanan, Surviving Partners of Themselves and Joseph Jacques, Deceased, and William A. Stuart, Deceased, Late Partners under the Firm Name and Style of Stuart, Buchanan & Co.

"On a Scire Facias to Revive a Judgment on a Scire Facias.

"This day came the plaintiff by her attorney, and it appearing to the court by the return of the sheriff that the defendants have been duly served with copies of the scire facias, and they not appearing, on motion of the plaintiff, it is considered by the court that the judgment be revived, and that the plaintiff may have ex-

ecution against the said defendants for the sum of $9,393.62, with legal interest on $5,297.60, a part thereof, from the 1st day of January, 1878, until paid, and $8.40 the costs in the scire facias specified, and that the plaintiff recover against the said defendants her costs in this behalf expended."

This order or judgment was docketed November 2, 1896.

At a subsequent day the same parties were again summoned to appear at the courthouse of Washington county on the 11th day of July, 1898, to answer a scire facias for an award of execution, and on the 22d of September of that year the following order was entered:

"Milton White, Jr., Administrator De Bonis Non with the Will Annexed, of Newton K. White, Deceased, *v.* George W. Palmer and Benjamin K. Buchanan, Surviving Partners of Themselves and Joseph Jacques, Deceased, and William A. Stuart, Deceased, Late Partners under the Firm Name and Style of Stuart, Buchanan & Co.

"On a Scire Facias to Revive a Judgment on a Scire Facias.

"This day came the plaintiff by his attorney, and it appearing by the return of the sheriff of Smyth county and the return of the sheriff of Washington county that the defendants George W. Palmer and Benjamin K. Buchanan have been duly served with a copy of the scire facias, and, they not appearing, on motion of the plaintiff it is considered by the court that the judgment be revived, and that the plaintiff may have execution against the said defendants for the sum of $9,393.62, with legal interest on $5,297.60, part thereof, from the 1st day of January, 1878, until paid, and $8.40 and $7.01, the costs in the scire facias specified, and that the plaintiff also recover against the said defendants his costs in this behalf expended."

There is the following indorsement upon this last judgment: "1898, Oct. 19th, fi fa issued to 1st January rules, to lie; 1899, January 9th, fi fa issued to 1st April rules—returned—held up by direction of the counsel. P. D. Clark, Deputy Sheriff for J. W. Hortenstine, S. W. C."

Exhibit E, with the bill, is as follows:

"Whereas Newton K. White has a judgment on the lien docket of Washington county, Virginia, which amounted on March 12, 1890, to $9,505.51, and which amount bears interest from that date as per agreement in writing of Stuart Buchanan & Co., with the said Newton K. White; and

"Whereas the balance due on said judgment as of February 12th, 1897, is $11,733.88; and

"Whereas William A. Stuart, now deceased, was a member of the firm of Stuart, Buchanan & Co., and was primarily liable as between the members of said firm of Stuart, Buchanan & Co. to pay one half of said judgment; and

"Whereas the said estate of William A. Stuart has this day paid one half of said amount, to wit, $5,866.94:

"Now, in consideration of the aforesaid payment of the said one-half said judgment by the said W. A. Stuart's estate, as aforesaid, the undersigned surviving members of the said firm of Stuart, Buchanan & Co. do hereby authorize and empower Hartley G. White, executrix of N. K. White, deceased, to mark satisfied the said judgment, so far, and only so far as the estate of the said William A. Stuart is concerned; but that such release shall in no wise affect the lien of the residue of said judgment, to wit: $5,866.94, as of February 12 '97, against us, which amount is admitted to be the correct balance due by us as of said date, and that the same is to bear interest from that date..

"Witness our hands and seals, February 12, 1897.

"Geo. W. Palmer. [Seal.]
"Ben K. Buchanan. [Seal.]
"By Jean Buchanan."

The bill in this case was filed at the first May rules, 1906.

From the recital which we have made it appears that 10 years did not elapse between the rendition of the decree of the Supreme Court of Appeals of July, 1882, and the suing out of the first scire facias at the May term, 1891. The same is true as to the interval between that order and the order upon the scire facias of September, 1896; and the last scire facias in the case was sued out at the September term, 1898.

The defendants were regularly summoned to answer each one of these proceedings, but they did not appear, and the question before us is: How far these judgments are open to collateral attack?

In the note to Frierson *v.* Harris's Heirs, found in 94 Am. Dec. 245, it is said: "An irregular or erroneous scire facias, like an irregular or erroneous execution, is voidable, but not void. If the irregularity is not taken advantage of in some appropriate method, the judgment of revivor is valid. It cannot be collaterally assailed, and will support title derived from an execution issued by its authority."

The proceeding by scire facias is with us, not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all of the facts necessary to

authorize the relief sought. It should follow the judgment to be revived as to the amount, date, and parties. Freeman on Judgments, § 444.

The utmost extent of the jurisdiction of a court upon a writ of scire facias, reciting a judgment for money, and notifying the defendants to appear and show why the plaintiffs should not have an execution against them for the debt, interest, and costs of said judgment, is to render judgment that the plaintiffs in the writ of scire facias have execution of the judgment in the writ set forth. Such judgment for award of execution does not constitute a lien on real estate; and a judgment on such a writ of scire facias (even where the writ is valid) for money, and not merely for award of execution, is in excess of the jurisdiction of the court, and is absolutely void, and may be so declared either in a direct or a collateral proceeding. If upon a writ of scire facias the court gives judgment for money, and also awards execution, so much of the order as is within the jurisdiction of the court—that is to say, that the plaintiff have execution for the debt and costs of judgment—would be valid; but as a judgment for money it would be void. Lavell *v.* McCurdy's Ex'rs, 77 Va. 763.

Want of jurisdiction makes the judgment of a court a nullity, and it may be so treated by any court in any proceeding, direct or collateral; but the judgment may be valid to the extent of the jurisdiction, and invalid beyond. Wade *v.* Hancock, 76 Va. 620.

The writ of scire facias is the only pleading in the proceeding. Its office is to revive a judgment. It must recite a judgment; and the sole order which can properly be entered upon it is that the plaintiff have execution upon the judgment.

Now, in the writ issued in 1896 there is no reference whatever to the original judgment. It recites the proceedings upon a scire facias issued on the 4th of May, 1891, and the order of the court which awards execution upon it recites that it is upon "a scire facias to revive a judgment on a scire facias." The same is true of the scire facias sued out on the 11th day of July, 1898, upon which there was an award of execution on the 22d day of September of that year. Both of them wholly fail to recite the judgment to be revived, or to make any reference whatever to the judgment to be revived. There is therefore a total failure to aver facts essential to the jurisdiction of the court.

If the validity of the proceeding by scire facias issued on the 16th of February, 1891, and upon which there was an award of execution on the 4th day of May, 1891, be conceded, it does not prevent the bar of the statute, for with the orders of September, 1896, and September, 1898, out of the way, the original judgment

was barred before the institution of this suit, which was on first May rules, 1906.

We are of opinion that there is no error in the decree of the circuit court, which is affirmed.

Affirmed.

CARDWELL, J., absent.

Note.

The principal case fairly bristles with important points upon a very important question of practice, namely, the revival of dormant judgments; but it is particularly gratifying to have it finally settled that scire facias to revive a decree in chancery is properly brought on the law side of the court in order to have execution awarded on it.

May Scire Facias Issue to Revive a Decree.—Since a scire facias is in the nature of a declaration, it is generally considered in law an action. Bank *v.* Marr, 13 Lea (Tenn.) 390; Gregory *v.* Chadwell, 3 Coldwell (Tenn.) 390; hence the writ will not lie in a court of chancery in the absence of a statute authorizing it. Jeffreys *v.* Yarborough, 1 Dev. Eq. (N. Car.) 510; Logan *v.* Cloyd, 1 A. K. Marsh. (Ky.) 201; Curtis *v.* Hawn, 14 Ohio 185; McCoy *v.* Nichols, 5 Miss. 31; Hughes *v.* Shreve, 60 Ky. 547. Though, as a general rule, it would seem that the revival of decrees in a court of law, as well as of judgments, by scire facias is authorized in the various states. Curry *v.* Piles, 8 Ga. 32; Isom *v.* McGehee, 45 Miss. 712; Carson *v.* Richardson, 3 Hayw. (Tenn.) 231; West Tennessee Bank *v.* Marr, 13 Lea (Tenn.) 108; Preston *v.* Golde, 12 Lea (Tenn.) 267.

In Curtis *v.* Hawn, 14 Ohio 185, it is held that the writ of scire facias to revive judgments in personal actions is a statutory remedy unknown to the common law. It is a legal remedy, and has never been introduced into courts of chancery. It cannot be used to revive a decree in chancery against heirs. A decree in case of the death of the respondent is revived against the heirs by a bill of revivor, or a petition in the nature of a bill of revivor.

While it is true that scire facias to revive decrees does not obtain in chancery practice proper, this remedy is appropriate to revive decrees rendered by the probate courts, because the transfer of the several chancery courts of the unfinished business of the probate courts carried with it all the agencies employed by the latter courts in the prosecution of causes therein, among which was a writ of scire facias for the revival and renewal of judgments. In such cases the scire facias is but the continuation of the original proceedings. Isom *v.* McGehee, 45 Miss. 712.

The ruling of the court in this case that upon a scire facias to revive a decree, an objection cannot be made that the execution issued from the law side of the court upon a decree in chancery, was inevitable in light of § 3557 which places decrees in chancery upon the same footing with judgments at law.

Nature of Proceeding.—The better opinion, and that supported by the weight of authority, is to the effect that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuance of the former suit. Alabama, Baker *v.* Ingersoll, 37 Ala. 503; Arkansas, Blackwell *v.* State, 3 Ark. 320; Florida, Brown *v.* Harley, 2 Fla. 159; Georgia, Dickinson *v.* Allison, 10 Ga. 557; Funderburk *v.* Smith, 74 Ga. 515; Illinois, People *v.* Compher, 14 Ill. 447; Smith *v.* Stevens, 133 Ill. 183; Challenor *v.* Niles, 78 Ill. 78; Indiana, Bern-

hamer *v.* State, 123 Ind. 577; Iowa, Denegre *v.* Haun, 13 Iowa 240; Maine, Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266; Maryland, Kirkland *v.* Krebs, 34 Md. 93; Bridges *v.* Adams, 32 Md. 577; Massachusetts, Comstock *v.* Holbrook, 16 Gray (Mass.) 111; Gray *v.* Thrasher, 104 Mass. 373; Mississippi, Vick *v.* Chewning, 31 Miss. 201; Douthit *v.* State, 30 Miss. 133; Missouri, State *v.* Randolph, 22 Mo. 474; Ellis *v.* Jones, 51 Mo. 180; Humphreys *v.* Lundy, 37 Mo. 320; Kratz *v.* Preston, 52 Mo. App. 251; New Jersey, Greenway *v.* Dare, 6 N. J. L. 305; New York, Dickey *v.* Craig, 5 Paige (N. Y.) 283; Gonnigal *v.* Smith, 6 Johns. (N. Y.) 106; M'Gill *v.* Perrigo, 9 Johns. (N. Y.) 259; Ohio, Wolf *v.* Pounsford, 4 Ohio 397; Pennsylvania, Eldred *v.* Hazlett, 38 Pa. St. 16; Irwin *v.* Nixon, 11 Pa. St. 419, 51 Am. Dec. 559; Ammon *v.* Styer, 14 Lanc. L. Rev. (Pa.) 86; South Carolina, Ingram *v.* Belk, 2 Strobh. L. (S. Car.) 207; Tennessee, Carter *v.* Carriger, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; Bilbo *v.* Allen, 4 Heisk. (Tenn.) 31; Texas, Hopkins *v.* Howard, 12 Tex. 7; Perkins *v.* Hume, 10 Tex. 50; Schmidtke *v.* Miller, 71 Tex. 103; Vermont, State Treasurer *v.* Foster, 7 Vt. 52; Virginia, Lavell *v.* McCurdy, 77 Va. 763; United States, Davis *v.* Packard, 7 Pet. (U. S.) 276; Fitzhugh *v.* Blake, 2 Cranch (C. C.) 37; Hatch *v.* Eustis, 1 Gall. (U. S.) 160; England, Adams *v.* Savage, 3 Salk. 321.

In Perkins *v.* Hume, 10 Tex. 50, it is held that such a scire facias is not an original suit where no new party is sought to be charged and no relief other than a simple revival is prayed, but a continuation of the former suit.

Although, as against the judgment debtor and his heirs or personal representatives, a scire facias proceeding is a continuation of the original proceedings in which the judgment was obtained, yet, as against terretenants who are entire strangers, a scire facias intended to subject land claimed by them to the payment of a judgment against another must be regarded as so far a new proceeding that everything necessary to coexist to affect their rights must appear in the writ. Bish *v.* Williar, 59 Md. 382.

Requisites and Sufficiency of Writ.—In a proceeding by scire facias to revive a judgment, the writ takes the place and performs the office of a declaration. Arkansas, Calhoun *v.* Adams, 43 Ark. 238; Florida, Brown *v.* Harley, 2 Fla. 159; Illinois, Smith *v.* Stevens, 133 Ill. 183; Farris *v.* People, 58 Ill. 26; Wilson *v.* School Trustees, 138 Ill. 285; Missouri, Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590; Maryland, McKnew *v.* Duvall, 45 Md. 501; Bowie *v.* Neale, 41 Md. 125; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Bish *v.* Williar, 59 Md. 382; Michigan, McRoberts *v.* Lyon, 79 Mich. 25; Ohio, Wolf *v.* Pounsford, 4 Ohio 397; Texas, Hopkins *v.* Howard, 12 Tex. 7; Tennessee, State *v.* Robinson, 8 Yerg. (Tenn.) 370; Virginia, McVeigh *v.* Old Dominion Bank, 76 Va. 267; England, Blake *v.* Dodemead, 2 Stra. 775; Bank of Scotland *v.* Fenwick, 1 Exch. 792.

Or as the court said in the principal case, it serves the double purpose of a writ and a declaration, and is the only pleading in the proceeding. See Calhoun *v.* Adams, 43 Ark. 238.

It should therefore contain everything necessary to constitute a good declaration, and should set forth, at least in substance, any fact upon which the plaintiff's right to have his judgment revived depends. Alabama, Miller *v.* Shackelford, 16 Ala. 95; Arkansas, Hicks *v.* State, 3 Ark. 313; Florida, Union Bank *v.* Powell, 3 Fla. 175; Illinois, Smith *v.* Stevens, 133 Ill. 183; Wilson *v.* School Trustees, 138 Ill. 285; Indiana, Graham *v.* Smith, 1 Blackf. (Ind.) 414; Lasselle *v.* Godfroy, 1 Blackf. (Ind.) 298; Kentucky, Huey *v.* Redden, 3 Dana

(Ky.) 488; Dozier *v.* Gore, 1 Litt. (Ky.) 163; Maryland, Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Warfield *v.* Brewer, 4 Gill (Md.) 265; Ohio, Wolf *v.* Pounsford, 4 Ohio 397; McVickar *v.* Ludlow, 2 Ohio 246; Union Bank *v.* Meigs, 5 Ohio 312; Virginia, Gedney *v.* Com., 14 Gratt. (Va.) 318; Evans *v.* Freeland, 3 Munf. (Va.) 119. It should contain upon its face such a statement of facts as will justify the form in which the process issued, and the persons who are made parties to it, and should show in what right and for what amount it is issued. McKnew *v.* Duvall, 45 Md. 501; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Warfield *v.* Brewer, 4 Gill (Md.) 265.

But in reciting a judgment on a prior scire facias, the writ need not recite the amount for which such judgment was obtained. Brown *v.* Chesapeake, etc., Canal Co., 4 Federal Reporter 770.

"The sci. fa. should set forth the grounds upon which it seeks the aid of the court; it is not every unsatisfied judgment which may be made the foundation for such writ. * * * That a party would not be likely to resort to such writ unnecessarily, is no answer to the general rule of law that every party who petitions the court to become active in his behalf must show, prima facie at least, that he is entitled to the relief which he seeks, or some relief consistent with his pleadings." Miller *v.* Shackelford, 16 Ala. 95.

Where the writ is under a particular statute it must set out facts sufficient to show that it comes within the provisions of the statute. Phelps *v.* Mott, Brayt. (Vt.) 191.

The ruling in this case that the scire facias must recite or make some reference to the original judgment, is supported by the great weight of authority.

In accordance with the general rule that the scire facias should be exact in its recital of former proceedings a scire facias for the purpose of reviving a judgment must correctly recite the original judgment, and must substantially identify it as to parties, date, and amount. Barron *v.* Tart, 19 Ala. 78; Ward *v.* Prather, 1 J. J. Marsh (Ky.) 4; Wolf *v.* Pounsford, 4 Ohio 397; Dietrich's Appeal, 107 Pa. St. 174; Landon *v.* Brown, 160 Pa. St. 538; Arrison *v.* Com., 1 Watts (Pa.) 374; Richter *v.* Cummings, 60 Pa. St. 441; Davis *v.* Norris, 8 Pa. St. 122; Ernst's Estate, 164 Pa. St. 87; Gibson *v.* Davis, 22 Vt. 374. See, also, Zumbro *v.* Stump, 38 W. Va. 325, 18 S. E. 443.

If the sci. fa. to revive recites the names of the legal plaintiff and defendant, the number and term of the judgment, its date and amount, the renewal is valid, although the name of the use plaintiffs are recited in the writ. Such recital is mere surplusage. Ernst's Estate, 164 Pa. St. 87, 30 Atl. 371.

Where the original judgment was for $2,500, to be released on payment of $900, both facts must be set out in the scire facias, and a recital of a judgment for $900 is error. Wolf *v.* Pounsford, 4 Ohio (4 Ham.) 397.

On sci. fa. by one of sixteen assignees of a judgment to revive it as to the amount of his interest, the judgment recited in the writ was in form: "The State Bank for the use of A. V. G. W. & P. K. B., assignee of G. W., terretenant in possession. Debt, $1,300,"—while the original judgment was: "State Bank *v.* G. W. Debt $28,120.72." Held that, the original judgment not being correctly recited, a judgment of revival did not revive the original judgment, either in whole or part. Appeal of Dietrich, 107 Pa. 174.

The rule that the scire facias must identify the original judgment with certainty applies to an amicable as well as other scire facias to revive a judgment; it must correctly recite the original judgment. Worman's Appeal, 110 Pa. St. 25; Early *v.* Zeiders, 137 Pa. St. 457.

In Worman's Appeal, 110 Pa. St. 25, it is held that an amicable scire facias to revive a judgment does not identify the original judgment so as to continue the lien against subsequent lienors, where the term and number of the original judgment, the date of which is incorrectly recited, are not given, and no note of the revival is made on the docket of the original judgment.

Where an amicable scire facias describes exactly the names of the parties, the term and number of the case, and the date and amount of the judgment as revived, the lien of the original judgment will be preserved, as against lands in the hands of a terretenant, although the terretenant in signing the amicable scire facias does not designate himself as terretenant, and the entry in the judgment docket does not so designate him, but he is so designated in the caption of the case, in the appearance docket, and in the agreement for revival. White *v.* Harden, 154 Pa. St. 387.

But if the writ of scire facias substantially describes the original judgment, this is sufficient. Barron *v.* Tart, 19 Ala. 78; Landon *v.* Brown, 160 Pa. St. 538.

In Andrews *v.* Buckbee, 77 Mo. 428, it is held that a scire facias, though informal, will be good after judgment upon it, if it contains enough to show what judgment is intended to be revived.

In Barron *v.* Tart, 19 Ala. 78, it is held that a scire facias to revive a judgment, as to costs, against an administrator, the damages having been paid, is sufficient if it substantially describes the judgment, although it does not state the amount of the costs. In this case the court said: "The scire facias required the plaintiff in error to appear and show cause why the judgment against his intestate should not be revived as to the costs, against him as administrator, etc., the damages having been paid; and the court awarded execution for the costs in the usual form against an administrator. As the scire facias stated all the matters of substance there was no error in overruling the demurrer. The scire facias did not state the amount of the costs, but the judgment was otherwise substantially described, which was sufficient. The scire facias was but a continuation of the former suit, and the execution awarded can only issue for the costs that were recovered, the amount of which is never, in our practice, stated in the judgment, but they are taxed by the clerk, and if he should commit an error, the remedy is easy. The judgment is affirmed.

It has been held in Park *v.* Webb, 3 Phila. (Pa.) 32, 15 Leg. Int. (Pa.) 28, that while a scire facias to revive a judgment which recites the judgment as for the gross amount of verdict and costs is sufficient, yet it would be better to recite the costs separately.

A mere immaterial variance or irregularity which does not tend to mislead, will not avoid the scire facias. Landon *v.* Brown, 160 Pa. St. 538; Early *v.* Zeiders, 137 Pa. St. 457. But where the gariance between the original judgment and the writ is material, it will be fatal upon a plea of nul tiel record. Dietrich's Appeal, 107 Pa. St. 174; Moore *v.* Garrettson, 6 Md. 444.

A slight variance in a scire facias, in the names of the parties, by which no one can be misled, does not render it ineffective to continue the lien of the judgment. Landon *v.* Brown, 160 Pa. St. 538. See, also, Davidson *v.* State, 20 Tex. 649; Pickett *v.* Pickett, 1 How. (Miss.) 267; Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190.

A substantial variance between the recital in a writ of scire facias and the judgment to be revived would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original. Dougherty's Estate, 9 W. & S. (Pa.)

189. In this case the court said: "It is objected also that the scire facias did not accurately recite the judgment to be revived; and it is certain that a substantial variance in that matter would break the continuity of the lien. The judgment was for $4,000, the penalty of a bond with condition to secure a note for $1,590, and another for $400; and the award of execution was for $2,000. Thus the record was described as what it actually though not technically was—a judgment for the real, not the nominal debt; so that the variance, though formal, was unsubstantial. The framing of our writs is injudiciously left to the prothonotaries, who have seldom any knowledge of forms; and all that we can do in these matters without injustice to suitors is to hold fast to substance. In Arrison *v.* Com., 1 Watts (Pa.) 374, the name of a different plaintiff was introduced, and the variance was necessarily held to be substantial; in the case before us the judgment is in substance what it was recited to be."

In Moore *v.* Garrettson, 6 Md. 444, it was held that if the scire facias recites as an absolute, unconditional judgment one which was rendered subject to the defendant's discharge under the insolvent laws, it is a fatal variance, and the proper mode to take advantage of it is by the plea of nul tiel record. "It appears as part of the case, though not as part of the pleadings, that the defendant's discharge was in fact pleaded to the original proceeding, and that the first judgment was rendered subject to that discharge. This being true, there was a fatal variance between the judgment actually rendered and that recited in the scire facias. The first was a qualified, conditional judgment, while that recited in the scire facias was obsolute and unconditional; in other words, there was in fact no such judgment of record as the one set out in the scire facias, and the defendant, instead of endeavoring to correct the error by pleading the discharge anew, if he had any redress, should have pleaded nul tiel record."

How May Defects in the Writ Be Availed of.—It would seem that a failure of the writ to set forth a substantial cause of action is a fatal defect on general demurrer. Brown *v.* Hardy, 2 Fla. 159; Graham *v.* Smith, 1 Blackf. (Indiana) 413; McKnew *v.* Duvall, 45 Md. 501; M'Kinney *v.* Mehaffey, 7 W. & S. (Pa.) 276.

"In England as well as in many of the states of the Union, the custom of declaring on scire facias is believed to exist. In Virginia, Kentucky, Tennessee, and some other states, the practice appears to be to plead to the writ. No evil attends this practice; every defense which could be made by way of plea or demurrer to a declaration may also be made to the writ, and unless it contains all the allegations and averments necessary to a valid declaration will be held bad on demurrer. The practice is convenient, because it waives the necessity of a formal declaration and prevents repetition on the record. The form of a declaration in scire facias on judgment is nothing more than a repetition of the writ, with a prayer for execution. The writ cites the defendant to show cause why execution shall not issue. It may be considered substantially in the nature of a prayer for execution." Brown *v.* Harley, 2 Fla. 159.

In Waller *v.* Huff, 9 Tex. 530, the judgment was rendered with a stay of execution until the happening of a certain event. The scire facias to revive said judgment and to obtain execution failed to allege that the event had happened, or to state any fact which would avoid the necessity of its happening, and to prove the same. The judgment went by default, but the court in holding that the want of such allegation and proof was fatal in error, said: "If the judgment be revived at all, it must be with all its terms, conditions, and contin-

gencies, unless it be alleged and shown to be now disencumbered. As it stands, the original judgment is ordered to be revived and execution issue, without any respect to that portion of the judgment which stayed execution or any showing why it should be disregarded. * * * The judgment is encumbered with a condition. If revived at all, it must be cum onere, or it must be alleged and shown that the ground for the suspension of execution no longer continues."

A failure of the scire facias to set out all the facts that are necessary to show a right to the relief prayed for, will also be ground for a motion to quash the same. Evans *v.* Freeland, 3 Munf. (Va.) 119.

What Judgment Should Be Entered upon the Writ.—It is also well settled, as this case decides, that the sole order which can properly be entered upon a scire facias to revive a judgment is that the plaintiff have execution on the original judgment. If the court grants a new judgment it is a nullity.

The reason for this is that, as has been stated, a scire facias to revive a judgment is not an original but a judicial writ, founded on some matter of record to enforce execution of it, and properly speaking, is only the continuation of an action; the proper entry of judgment, therefore, upon such writ, is an award of execution for the amount of the original judgment, with interest from its rendition, and costs. Florida, Brown *v.* Harley, 2 Fla. 159; Iowa, Denegre *v.* Haun, 13 Iowa 240; Von Phul *v.* Rucker, 6 Iowa 187; Vredenburgh *v.* Snyder, 6 Iowa 39; Kentucky, Murray *v.* Baker, 5 B. Mon. (Ky.) 172; Maryland, Huston *v.* Ditto, 20 Md. 305; Mississippi, Locke *v.* Brady, 30 Miss. 21; Hughes *v.* Wilkinson, 37 Miss. 482; Vick *v.* Chewning, 31 Miss. 201; Missouri, Humphreys *v.* Lundy, 37 Mo. 320; Sappington *v.* Lenz, 53 Mo. App. 44; Montana, Haupt *v.* Burton, 21 Mont. 572; New Jersey, Woolston *v.* Gale, 9 N. J. L. 32; South Carolina, Adams *v.* Richardson, 32 S. Car. 139; Tennessee, Rogers *v.* Hollingsworth, 95 Tenn. 357; Lain *v.* Lain, 3 Baxt. (Tenn.) 30; Texas, Bullock *v.* Ballew, 9 Tex. 498; Bridges *v.* Samuelson, 73 Tex. 522; Virginia, Lavell *v.* McCurdy, 77 Va. 763. It should not be a judgment of recovery, Von Phul *v.* Rucker, 6 Iowa 187, and, therefore, it will be ground for error if the court renders a new judgment, instead of simply reviving the old one subject to the proper credits for payment.

"The form of the judgment upon scire facias in such a case, on a return of scire feci, where the defendant pleaded thereto in bar of execution, is thus given in Tidd. App. 515: 'Therefore it is considered that the said plaintiff have his execution against the said defendant of the damages aforesaid, according to the force, form, etc. And it is also considered by the court here that the said plaintiff do recover against the said defendant for his costs and charges by him laid out about his suit in this behalf, on occasion of the said defendant having pleaded to the said writ of scire facias, by the court here adjudged,' etc. If it is upon two returns of nihil, then that fact is stated and the default recorded, and execution being awarded there is no judgment for the costs of the suit and proceedings therein."

In Brown *v.* Harley, 2 Fla. 159, it was held that a judgment on a writ of scire facias for a specific sum in damages and costs was erroneous, and that it should have been, "Let execution issue, according to the force, form, and effect of the judgment" originally rendered.

In Murray *v.* Baker, 5 B. Mon. (Ky.) 172, it was held error to enter judgment for debt or damages on a scire facias, and that the judgment should be, that plaintiff have execution of the debt or damages, etc., in the scire facias mentioned. See also the case of Sappington *v.* Lenz, 53 Mo. App. 44, in which it is held that the judgment

of revivor in such a proceeding should simply declare that the judgment revived is still in force for the amount remaining unpaid thereon; that, while it should not find the aggregate amount of principal and interest due on the judgment at the date of the revivor, yet when it does so, such additional finding will not invalidate it, but will be treated as surplusage.

In Adams *v.* Richardson, 32 S. Car. 139, where the order to the effect that "the judgment herein be revived," contained in addition the words "with all the force and effect of the former recovery," it was held that such additional words added nothing to the effectiveness of the order.

A judgment on scire facias to revive a judgment should be an award of execution and not quod recuperet. Locke *v.* Brady, 30 Miss. 21.

In Fitzgerald *v.* Evans, 53 Tex. 461, it was held that a judgment of revivor which simply recited and verified the rendition of the former judgment, but which made no provision for the issuance of execution to enforce the collection of the amount formerly ascertained to be due, was not a final judgment.

In Rogers *v.* Hollingsworth, 95 Tenn. 357 the court said: "It is next insisted the court erred in giving a new judgment instead of simply reviving the old one subject to the credit, and awarding execution thereon. This assignment is well taken. The proper practice in cases of scire facias to revive former judgments is to order their revivor and award execution, to bear interest from the date when originally rendered, and not to give a new judgment for the amount of the original one and interest. It is not the case of a suit upon the original judgment, which might have been brought. Lain *v.* Lain, 3 Baxt. (Tenn.) 32; Fogg *v.* Gibbs, 8 Baxt. (Tenn.) 464. The judgment of the circuit court should have been such as the justice ought to have rendered, namely, that the original judgment stand revived and plaintiff have execution with interest and costs of the scire facias subject to the proper credit, and execution should have issued without procedendo." Citing Whitworth *v.* Thompson, 8 Lea (Tenn.) 487.

In Vermont, Rev. Laws of 1842, § 1443, provides that "in actions of scire facias commenced to revive or enforce the execution of a judgment, the court shall, unless cause is shown to the contrary, render judgment in favor of the plaintiff for the amount of the original judgment with interest and costs on the scire facias." In the case of Slayton *v.* Smilie, 66 Vt. 197, the court, in holding that this section changed the character of the judgment to be rendered in such scire facias proceedings, said: "By this act the court is required to render a new judgment for damages and costs, and the execution is for the enforcement of the new judgment. The new judgment is not, as in scire facias at common law, that the plaintiff may have execution on the original judgment, but that he is to have and recover a different amount of damages, an amount ascertained by adding the costs to the damages in the original suit, and deducting therefrom what has been paid or satisfied, if anything, and computing interest on the sum thus found from the rendition of the original judgment."

Validity of Judgment of Revivor.—The New York cases fully sustain the ruling of the court in the principal case that, a scire facias to revive a judgment irregularly issued, is voidable only, and cannot be called in question in a collateral action. Jackson *v.* Delancy, 13 Johnson (N. Y.) 537; Jackson *v.* Bartlett, 8 Johnson (N. Y.) 365; Jacksor *v.* Robins, 16 Johnson (N. Y.) 537.